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**IN THE
COURT OF APPEALS OF INDIANA**

WILL G. LONG,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 27A02-0702-CR-192

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0509-FB-148

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Will G. Long appeals his convictions for Possession of a Firearm by a Serious Violent Felon,¹ a class B felony, Attempting to Commit Resisting Law Enforcement,² a class A misdemeanor, and three counts of Carrying a Handgun Without a License,³ a class C felony. Specifically, Long argues that the trial court erred when it admitted evidence of a handgun found on Long after an officer conducted a pat-down search. Finding that the evidence of the handgun was properly admitted at trial, we affirm the judgment of the trial court.

FACTS

At approximately 11:00 p.m. on September 2, 2005, Marion Police Department Officer Steve Wolfe arrived at the intersection of 8th and Boots Streets in Marion after receiving a report of a disturbance. Upon his arrival, Officer Wolfe saw a large group of people and a vehicle stopped without its lights on in a driving lane, which the officer knew to be a traffic violation. The group began to disperse after noticing Officer Wolfe. Officer Wolfe heard the vehicle start its engine and saw it begin to move north on Boots Street. Officer Wolfe activated the emergency lights on his vehicle and performed a stop.

Long was in the front passenger seat of the vehicle. As Officer Wolfe approached and began to speak to the driver, he noticed that Long appeared nervous and was shaking. Marion Police Department Officer Austin Lamb arrived at the scene shortly thereafter and approached the passenger side of the vehicle. When asked his name, Long told Officer Lamb

¹ Ind. Code § 35-47-4-5.

² Ind. Code § 35-41-5-1; Ind. Code § 35-44-3-3(a)(1).

that it was “Reginald Smith.” Tr. p. 46. Officer Wolfe asked Long how to spell the name, and Long “seemed to have some sort of difficulty spelling Reginald.” Id. at 46. When asked the date of his birth, Long first replied that it was March 21, 1978, but quickly changed his answer to March 21, 1980. When asked his age, Long initially replied that he was twenty-one years old but immediately changed his answer to twenty-seven years old. Long claimed that he did not have identification with him.

Officer Lamb noticed that Long was nervous, “fairly fidgety[,]” and “kind of shaky.” Id. at 147. Because Long appeared nervous and had given the officers conflicting information, Officer Lamb asked him to exit the vehicle. Although Officer Lamb asked Long to place his hands on the rear of the vehicle, Long continued to fidget and move. When Officer Lamb asked Long to take a step back and spread his legs, Long did “kind of a shuffle to bring his legs forward[,]” which signified to Officer Lamb that Long was either preparing to run or fight the officers. Id. at 149.

Long’s actions heightened Officer Lamb’s concern for his safety, and he performed a pat-down search of Long. The officer felt a small, hard object in Long’s right rear pocket and immediately deduced that it was a small handgun. As soon as Officer Lamb put his hand into Long’s pocket to retrieve the handgun, Long turned to flee but was tackled to the ground by Officer Wolfe. The officers removed the handgun from Long’s pocket, handcuffed him, and placed him in the rear of Officer Lamb’s vehicle.

On September 8, 2005, the State charged Long with class B felony possession of a

³ I.C. §§ 35-47-2-1, -23.

firearm by a serious violent felon, class A misdemeanor carry a handgun without a license, class A misdemeanor attempting to commit resisting law enforcement, class B misdemeanor false informing, and three counts of class C felony carry a handgun without a license. On September 1, 2006, Long filed a motion to suppress evidence of the handgun. Specifically, Long argued that the officers did not have the facts at that time to form a reasonable suspicion that Long had committed or was in the act of committing a crime. The trial court held a hearing and denied Long's motion to suppress.

A bench trial was held on September 5, 2006. After the presentation of evidence, the trial court acquitted Long of the class B misdemeanor false reporting charge and found him guilty of the remaining charges. A sentencing hearing was held on October 19, 2006, and the trial court vacated the class A misdemeanor carrying a handgun without a license charge and sentenced him to a total term of twenty years imprisonment. Long now appeals.

DISCUSSION AND DECISION

Long argues that Officer Lamb's pat-down search violated the Fourth Amendment to the United States Constitution.⁴ Specifically, Long argues that the officers did not have reasonable, articulable suspicion to believe that Long had engaged in criminal activity.

I. Standard of Review

We initially observe that because this is not an appeal from an interlocutory order

⁴ While Long initially cites Article I, section 11 of the Indiana Constitution, he does not make a separate argument regarding the constitutionality of the pat-down search under the Indiana Constitution. Therefore, Long has waived this argument and we will only address the constitutionality of the search pursuant to the Fourth Amendment. See Ackerman v. State, 774 N.E.2d 970, 978 n.10 (Ind. Ct. App. 2002) (holding that

denying a motion to suppress, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. We review a trial court's determination as to the admissibility of evidence for an abuse of discretion, and we will reverse only when the decision is clearly against the logic and effect of the facts and circumstances. Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

Our standard of review with regard to rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pretrial motion to suppress or by trial objection. Ackerman, 774 N.E.2d at 974-75. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. Collins v. State, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), trans. denied. However, we must also consider the uncontested evidence favorable to the defendant. Id.

II. Admissibility of Handgun

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” Our analysis begins with the recognized presumption that the Fourth Amendment prohibits warrantless searches and seizures. Edwards v. State, 762 N.E.2d 128, 132 (Ind. Ct. App. 2002). When the State acts without the benefit of a warrant, it has the burden of demonstrating that the challenged action fits within one of the warrant

defendant's failure to analyze the facts of his case pursuant to the Indiana Constitution results in waiver of the argument).

exceptions. Id.

We have previously held that the Fourth Amendment permits an officer to order the driver and passengers to exit a lawfully stopped vehicle. Lockett v. State, 747 N.E.2d 539, 543 (Ind. 2001); Tumblin v. State, 736 N.E.2d 317, 321 (Ind. Ct. App. 2000). Our Supreme Court has provided that

[a] traffic stop is more akin to an investigative stop under Terry v. Ohio, 392 U.S. 1 (1968), than a custodial arrest. Berkemer v. McCarty, 468 U.S. 420, 439 (1984). The United States Supreme Court in Terry stated the issue of unreasonableness of an investigative stop properly considers whether the officer's actions were "reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 19-20. In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), the Supreme Court observed that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop" and that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Id. at 500.

The touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Terry[, 392 N.E.2d at 19]. Reasonableness, of course, depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). The safety of police officers is a "legitimate and weighty" justification for intrusion. Id.

Lockett, 747 N.E.2d at 541-42 (some internal citations omitted). An officer's authority to conduct a pat-down search is dependent upon the nature and extent of his particularized concern for his safety. Wilson v. State, 745 N.E.2d 789, 792 (Ind. 2001).

Here, Officer Wolfe performed a traffic stop on the vehicle Long was riding in after observing a traffic violation. As detailed in the facts, both officers noticed that Long

appeared nervous and was shaking. In response to Officer Lamb's questions, Long gave multiple elusive answers, including a name that he could not correctly spell, two different birthdates, and two inconsistent ages. After exiting the vehicle, Long refused to leave his hands on the rear of the vehicle, as Officer Lamb had directed. Furthermore, while failing to follow the officer's directions, Long assumed an upright stance, an action that Officer Lamb recognized typically precedes a fight-or-flight response. Long's actions caused Officer Lamb to believe that his safety might be in jeopardy because "[Long's] demeanor, um, the way he was, he was more nervous than what you usually would be. Uh, that and the fact that he gave the wrong information, or conflicting information when asked." Tr. p. 147.

In sum, the totality of the circumstances made Officer Lamb's concern for his safety objectively reasonable, thereby justifying the pat-down search. Long's evasive, nervous behavior, failure to keep his hands on the rear of the vehicle, and fight-or-flight stance indicated to Officer Lamb that his safety might be in jeopardy. This reasonable fear justified the pat-down search. See Williams v. State, 754 N.E.2d 584, 588 (Ind. Ct. App. 2001) (holding that an officer's reasonable fear of danger justifies a pat-down search of the defendant's outer clothing in an attempt to discover weapons that might be used to harm the officer). Therefore, the pat-down search did not violate Long's Fourth Amendment rights, and the trial court did not abuse its discretion by admitting the handgun into evidence.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.